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Public Prosecutor v Lagan ak Mungkum & Anor

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HIGH COURT (MIRI) — CRIMINAL TRIAL NO MYY-45B-3/8 OF 2015
ALWI ABDUL WAHAB JC
15 FEBRUARY 2018

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Criminal Law — Offences — Murder — Both accused charged with offence of murder punishable under s 302 of the Penal Code and read together with s 34 of the same — Whether prima facie case proven — Whether evidence of chemist satisfactory — Whether Turnbull's Guidelines complied with in identification process — Whether prosecution had proven case beyond reasonable doubt — Penal Code ss 34 & 302

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Both the accused were charged with the murder of one Harman ('the deceased'), an offence punishable under s 302 of the Penal Code ('the Code') and read together with s 34 of the Code. The prosecution relied on the evidence of Maksun Abuandi ('PW6') who claimed to have witnessed the incident of the murder of the deceased. PW6 testified that he saw both the accused pointing the shotguns at the deceased and he could also see the smoke blowing from the end of the first accused's shotgun barrel. At the defence stage, the defence sought to cross-examine the chemist ('PW12') on one critical issue regarding the result of the analysis in exhs D1(2), (3) and (4) which contained photographs of gunshot residue ('GSR') particles taken using the scanning electron microscope. Based on the evidence of PW12, he agreed that GSR particles would look like a sphere shape to indicate the presence of GSR particles through the photographs taken using the scanning electron microscope, however, the photographs at pp (2), (3) and (4) of exh D1 showed the images in a square box shape which also indicated the presence of the GSR particles as alleged by the prosecution.

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Held, discharging and acquitting both the accused:

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(1) The court found that there was a prima facie case that had been made out based on the following reasons: (a) that both the accused were seen at the crime scene aiming their shotguns at the direction of the deceased at which time the deceased was last seen alive; (b) the evidence that there was GSR found on the long brown trousers worn by the first accused; (c) that there was evidence that a shotgun and the cartridges believed to have been used in the commission of the crime were found behind the house which was previously occupied by the second accused; and (d) that

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A the above direct and circumstantial evidence taken cumulatively led to suggest the commission of the murder by the first and second accused (see para 3).

(2) The evidence given by PW12 remained unsatisfactory to the extent that B the court was facing some difficulties to conclude with any degree of certainty whether the result of the analysis of the sample using the scanning electron microscope showing photographs (exh D1(2), (3) and (4)) were that of the GSR particles (see paras 80 & 97).

C (3) The standard procedures under the *Turnbull*'s guidelines had not been fully complied with by the prosecution witnesses especially the ID parade officer as PW6 had the benefit of seeing both the accused when they were detained in the same lock-up before the ID parades were conducted. Further, PW6's evidence that he had seen both the accused at the place of D the incident was unreliable because he had changed his evidence from allegedly seeing the first and second accused for about one to two minutes and later told the court that he allegedly seeing them for only about one to two seconds (see paras 90–91 & 98).

(4) On the finding of the burnt shotgun and cartridges, although they were E discovered behind the house previously occupied by the second accused, there was no evidence to show that the second accused had an exclusive control and possession of the said exhibits, as such, such finding could not be a conclusive proof to relate both the accused with the murder of the deceased. Having considered all evidence at the conclusion of the F trial, the court found that the prosecution had failed to prove its case beyond reasonable doubt (see paras 92 & 99–100).

[Bahasa Malaysia summary

Kedua-dua tertuduh dituduh membunuh seorang yang bernama Harman ('si G mati'), kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan ('Kanun') dan dibaca bersama dengan s 34 Kanun. Pihak pendakwaan bergantung ke atas keterangan Maksun Abuandi ('PW6') yang mendakwa menyaksikan kejadian pembunuhan si mati tersebut. PW6 memberi keterangan bahawa dia nampak kedua-dua tertuduh mengacu senapang H kepada si mati dan dia juga nampak asap keluar daripada penghujung laras senapang tertuduh pertama. Pada peringkat pembelaan, pembelaan memohon untuk memeriksa balas ahli kimia ('PW12') atas satu isu kritikal berkenaan keputusan analisa dalam ekhs D1(2), (3) dan (4) yang mengandungi foto partikel sisa tembakan ('GSR') yang diambil dengan menggunakan mikroskop I elektron imbasan. Berdasarkan keterangan PW12, dia bersetuju bahawa partikel GSR akan lihat seperti bentuk sfera untuk menunjukkan kehadiran partikel GSR melalui foto-foto yang diambil dengan menggunakan mikroskop elektron imbasan, walau bagaimanapun, foto-foto di ms (2), (3) dan (4) eksh D1 menunjukkan imej-imej dalam bentuk kotak empat segi yang mana

juga menunjukkan kehadiran partikel GSR seperti yang didakwa oleh pihak pendakwaan. A

Diputuskan, melepaskan dan membebaskan kedua-dua tertuduh:

(1) Mahkamah mendapati bahawa terdapat kes prima facie yang telah dibuat berdasarkan alasan-alasan berikut: (a) bahawa kedua-dua tertuduh dilihat berada di tempat kejadian mengacukan senapang mereka ke arah si mati pada masa si mati terakhir dilihat hidup; (b) keteragan bahawa GSR didapati atas seluar panjang perang yang dipakai oleh tertuduh pertama; (c) bahawa terdapat keterangan yang senapang dan kartrij dipercayai telah digunakan dalam pelakuan jenayah adalah didapati di belakang rumah yang terdahulunya dihuni oleh tertuduh kedua; dan (d) bahawa keterangan langsung dan keadaan yang diambil secara kumulatif membawa kepada cadangan pelakuan pembunuhan oleh tertuduh pertama dan kedua (lihat perenggan 3). B C D

(2) Keterangan yang diberikan oleh PW12 kekal tidak memuaskan kepada tahap bahawa mahkamah menghadapi beberapa kesulitan untuk memutuskan dengan apa-apa tahap ketentuan sama ada keputusan analisa sampel dengan menggunakan mikroskop elektron imbasan menunjukkan foto-foto (eksh D1(2), (3) dan (4)) adalah partikel GSR tersebut (lihat perenggan 80 & 97). E

(3) Prosedur standard di bawah garis panduan *Turnbull* tidak dipatuhi sepenuhnya oleh saksi-saksi pihak pendakwaan terutamanya pegawai perbarisan pengecaman kerana PW6 mempunyai kelebihan dapat melihat kedua-dua tertuduh apabila mereka ditahan dalam lokap yang sama sebelum perbarisan pengecaman dijalankan. Selanjutnya, keterangan PW6 bahawa dia telah melihat kedua-dua tertuduh di tempat kejadian adalah tidak dapat percayai kerana dia telah menukar keterangannya daripada mendakwa melihat teruduh pertama dan kedua untuk selama satu hingga dua minit dan kemudiannya memberitahu mahkamah yang dia melihat mereka untuk hanya satu hingga dua saat (lihat perenggan 90–91 & 98). F G

(4) Atas dapatan senapang dan katrij yang terbakar, walaupun ia didapati di belakang rumah yang dahulu dihuni oleh tertuduh kedua, tidak terdapat keterangan untuk menunjukkan bahawa tertuduh kedua mempunyai kawalan dan milikan eksklusif ekshibit-ekshibit tersebut, dengan itu, dapatan sedemikian tidak boleh menjadi bukti eksklusif untuk menghubungkan kedua-dua tertuduh dengan pembunuhan si mati. Setelah mempertimbangkan kesemua keterangan di akhir perbicaraan, mahkamah mendapati bahawa pihak pendakwaan telah gagal untuk membuktikan kesnya melampaui keraguan munasabah (lihat perenggan 92 & 99–100).] H I

Notes

For cases on murder, see 4(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2079–2096.

Cases referred to

Chan Chwen Kong v PP [1962] 1 MLJ 307, CA (refd)
Duis Akim & Ors v PP [2014] 1 MLJ 49; [2013] 9 CLJ 692, FC (distd)
Goh Wee Khian & Ors v PP and other appeals [2013] 6 MLJ 48, CA (refd)
PP v Ang Soon Huat [1991] 1 MLJ 1, HC (refd)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617, FC (refd)
PP v Sulaiman bin Mohamad Noor [1996] 1 MLJ 196, HC (refd)
Sunny Ang v PP [1966] 2 MLJ 195, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952
Penal Code ss 34, 302

Musli bin Ab Hamid (Deputy Public Prosecutor, Attorney General's Chambers) for the complainant.
Ranbir Singh Sangha (Ranbir S Sangha & Co) for the first and second accused.

Alwi Abdul Wahab JC:

INTRODUCTION

[1] Both the accused in the present case are brothers and they faced a charge of murder which they jointly committed against an Indonesian citizen HARMAN (L) PASSPORT AN 919941 on 20 February 2015 at about 12.15 midday, at ladang Tiga Seatex, Jalan Karabungan, Batu Niah, Miri, Sarawak which is an offence punishable under s 302 of the Penal Code and read with s 34 of the same Code.

[2] The elder brother is Lagan ak Mungkun ('the first accused') and the younger brother is Columbus ak Mungkun ('the second accused').

[3] On 28 July 2017, I called upon both the accused to enter their defence as I found that there is a prima facie case that has been made out. I gave my brief reasons why I decided to do so and there are as follows:

(a) that both accused were seen at the crime scene aiming their shotguns at the direction of the deceased at which time the deceased was last seen alive.

(b) the evidence that there was gunshot residue ('GSR') found on the long brown trousers ('exh P53B') worn by the first accused as contained in the chemist report ('exh P24') prepared by PW12;

(c) that there is evidence that a shotgun and the cartridges believed to have been used in the commission of the crime were found behind the house which was previously occupied by the second accused; and

(d) that the above direct and circumstantial evidence taken cumulatively leads to suggest the commission of the murder by the first and second accused.

THE BACKGROUND FACTS OF CASE

[4] The prosecution's case rests substantially on direct evidence of Maksun Abuandi ('PW6') who claimed to have witnessed the incident of the murder of his countryman Harman ('the deceased') at Ladang Seatex oil palm plantation on the 20 February 2015 at around 12.15 midday.

[5] PW6 testified that on the same day at about 8am, he was at Ladang Seatex together with the deceased doing their daily routine work that is harvesting the oil palm fruits.

[6] At about 10am while they were working in the estate, both PW6 and the deceased heard sound of a gunshot. After about an hour later, they heard another sound of a gunshot and this time around, it was louder than the previous one. Both PW6 and the deceased did not suspect anything amiss at that time as they thought it could be the sound of someone shooting a wild boar. So, they continued with their harvesting and collecting the oil palm fruits at the next hill and after they have completed, the deceased proceeded downhill to do the same followed closely by PW6 from behind collecting the fruits harvested by the deceased.

[7] After PW6 finished collecting the oil palm fruits, he then carried them to the roadside while the deceased was still at the downhill. He unloaded the oil palm fruits on the road and during that process, he heard a third gunshot. When he turned his face behind, he saw three men, two of them he identified as the first and second accused who were carrying the shotguns facing the deceased and another man was carrying a parang facing backward towards him.

[8] PW6's evidence was that he saw the first and second accused pointing the shotguns at the deceased and he could also see the smoke blowing from the end of the first accused's shotgun barrel. Having seen this, PW6 shouted towards the deceased asking him to run away by saying 'Man! Lari!'. PW6 could see the deceased was partially walking and partially running with a palm spear (exh

P41(A) in his right hand away from the scene of the incident.

[9] When PW6 shouted at the deceased, one of the accused persons then pointed the shotgun at him which prompted PW6 to run away off the scene to save his life. PW6 further testified that he could see the faces of the first and second accused even though there were bushes which were only about a waist height.

[10] He informed his supervisor, Pak Cik Balan about what had happened and brought him to the scene of the shooting incident in the plantation. On arrival, PW6 saw the deceased's body lying unconsciously on the ground by the side of the plantation road and it was covered with blood. Subsequently, PW6 narrated this matter to his Bugis friend and later on to the police.

[11] The first accused and his son, Justin Roy ak Lagan were arrested at their house on the same day of the incident and the second accused was also arrested on the same day at the Batu Niah Police Station. Their clothes were seized by the police for the DNA analysis.

THE DECEASED BODY WAS IDENTIFIED AS HARMAN

[12] PW6 could identify the deceased's body as Harman who is his friend since childhood as they were studied in the same school during their school days.

[13] A post mortem on the deceased's body was conducted on the 26 February 2015 by the pathologist, Dr Abdul Karim ('PW11').

THE GUNSHOT WOUND HAD CAUSED THE DECEASED DIED

[14] Based on the post-mortem report (exh P16) prepared by PW11, the deceased sustained several gunshot wounds and the pellets from the shotgun were also found inside the deceased's body. The deceased was declared died due to the gunshot wound.

[15] Based on the evidence of PW6 and the post-mortem report, the deceased was identified as Harman and he died due to bodily injuries that he suffered.

[16] The prosecution had therefore proven these two elements of the charge. Next, the prosecution has to prove that both the first and second accused were acting in furtherance of their common intention to cause bodily injuries on the deceased with the intention to kill him.

THE IDENTITY OF THE TWO ACCUSED PERSONS

[17] The prosecution submitted that both the first and second accused were not strangers to PW6 as he had already known the first and second accused prior to the shooting incident.

[18] As testified by PW6, he had ever seen the first accused in two previous occasions that is when he was on his way to work together with the deceased and when his supervisor, Pak Cik Balan pointed the first accused to him when the latter was passing by Pak Cik Balan's house.

[19] PW6 also met the second accused once ie about two weeks after he started working at Ladang Seatex as he was told by the accused and that was the time when PW6 took the iron rod to load the oil palm fruits.

[20] The prosecution further submitted that the identification of the two accused was made easier as the incident occurred during broad daylight and PW6's eyesight was not obstructed by any object.

THE ID PARADE

[21] During the ID parade PW6 could identify the first and second accused. The prosecution, however, submitted that the ID parade can actually be dispensed with because PW6 had already identified the first and second accused who were present at the shooting scene and one of them had discharged the shotgun at the deceased.

COMMON INTENTION

[22] As stated above, the prosecution's case is based on direct evidence of PW6 and also the circumstantial evidence such as the detection of the GSR particles on the brown long pants worn by the first accused and the burnt shotgun and cartridges which were found at the backyard of the second accused's house occupied by him previously.

[23] It was thus the prosecution's submission that the combination of these direct evidence and circumstantial evidence are more than sufficient for the court to make a safe finding against the two accused persons. It was further submitted that, even in the absence of direct evidence, the prosecution may resort to adducing circumstantial evidence to sustain the convictions (*Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617).

[24] The prosecution further submitted that the cumulative effect of all the circumstantial evidence led to the irresistible conclusion that it was both the accused persons who committed this crime in furtherance of their common intention.

[25] The fact that the GSR particle was found on the brown long pants belonged to the first accused goes to show that it was the first accused who had discharged the shotgun and he could not be heard to say that he was not aware of the shooting incident.

[26] Further, the fact that the burnt shotgun and cartridges were found in the backyard of the house previously occupied by the second accused and his family also goes to show that the second accused had intended to conceal them secretly to avoid from detection by the authority.

[27] The prosecution also submitted that the conduct of the wife of the first accused in handing a box of firecrackers to ASP Soliment ('PW22') on 5 January 2016 after the report concerning the finding of the GSR on the long pants of the first accused (exh P24) dated 24 June 2015 is suspicious. The prosecution further submitted that this was an attempt by the defence to fabricate evidence by suggesting that the source of the GSR detected on the long pants of the first accused was not from the gunshot but the firecrackers.

[28] However, a chemist, Mohd Riduan bin Bakir ('PW14') who testified and produced his chemist report (exh P39) stating that the chemical components of the firecrackers are not the same with the chemical components of the GSR which evidence was corroborated by another chemist, Saiful Fazamil ('PW12').

[29] It was the prosecution case that the above circumstantial evidence must be considered not only by the strength of each individual strand of evidence but the combined strength of these strands when twisted together to make a rope which means that the total effect of all them, all lead to the irresistible inference and conclusion that both the accused persons committed this crime (*Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195; *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307).

[30] The deceased was last seen alive by PW6 before the sound of the third gunshot and immediately after that he saw both accused persons were pointing their shotguns at the deceased at the crime scene.

[31] The prosecution submitted that although only one of them had actually discharged the shotgun but by being present at the scene and having both of

them armed with the shotguns, it had been proven that the action was committed by both the accused persons in furtherance of their common intention under s 34 of the Penal Code (*Goh Wee Khian & Ors v Public Prosecutor and other appeals* [2013] 6 MLJ 48).

[32] Having heard the prosecution evidence both direct and circumstantial at the end of prosecution case and taken cumulatively, I ruled that there is a prima facie case. Both the accused were then called to enter defence.

THE DEFENCE

[33] After the defence was called, the learned counsel Mr Ranbir applied to this court to recall the chemist PW12 to be further cross-examined by the defence and this was opposed by the prosecution.

[34] This court, however, allowed the defence request to cross PW12 on one critical issue regarding the result of the analysis in exhs D1(2), (3) and (4) which contained photographs of GSR particles taken using the scanning electron microscope.

[35] Exhibits D1(2), (3) and (4) was produced by PW14 who told the court that the same were supplied to him by PW12 and this evidence came after PW12 had given evidence.

[36] Since PW12 claimed that he never took the photographs of the samples using the scanning electron microscope during the analysis and from the evidence of PW14 that the exhs D1(2), (3) and (4) containing the photographs of the sample which were supplied to him by PW12, it is my view that PW12 must be given the opportunity to explain the contradictions in his evidence.

[37] It must be noted that the result of the analysis on the stubbing sample as in exhs D1(1)–(14) would show whether any GSR particles are present or not.

[38] Based on the evidence of PW12, he agreed that the GSR particles will look like a sphere shape to indicate the presence of GSR particles through the photographs taken by using the scanning electron microscope.

[39] However, the photographs at pp (2), (3) and (4) of exh D1 showed the images in a square box shape which also indicates the presence of the GSR particles as alleged by the prosecution.

[40] Hence, further cross-examination of PW12 becomes necessary to prove

that the photographs shown in exhs D1(2), (3) and (4) are truly representing the finding of the GSR particles found on the trousers of the first accused.

[41] As GSR comprises of lead, barium and antimony and the same chemical components can be found in the brake linings of car, motorcycles and bicycle as agreed by PW12, and as the GSR fired from a shotgun will spread all over and cannot be concentrated at only on one spot, it was the contention of the defence that the alleged GSR found on the brown trousers of the first accused indicates the presence of lead, barium and antimony which are likely to have come from the brake linings of a car, motorcycle or bicycle.

[42] The defence also highlighted on the failure by the prosecution to tender the physical exhibits ie the metal stubs allegedly sent by PW14 to PW12 for analysis as the same had been recycled by PW14. In substitute, the photographs of the metal stubs were tendered. In particular, a metal stub marked E6A which had GSR on it could not be identified by PW12 in the photograph marked as exhs P27(A)–(C) as there are a few other metal stubs that could be seen in the same photograph.

THE DEFENCE OF ALIBI

[43] Both the first and second accused relied on the defence of alibi and called their respective alibi witnesses primarily to establish that both were not at the scene of the incident at the material time.

[44] In respect of the first accused, the alibi evidence came from his wife, Selimah ak Tindit ('DW8'), his son and daughter together with their spouses respectively namely Justin Roy ak Lagan ('DW4'), Katherine Jelendai ak Ramba ('DW5'), Annie ak Lagan ('DW7') and Hazzani Hadzari @ Aboy ('DW6').

[45] The alibi witness for the second accused is his ex-wife Sandra ak Veronica ('DW3').

[46] The prosecution submitted that the defence of alibi advanced by both accused cannot stand due to some contradictions in their evidence. For instance, defence witnesses were not consistent on what happened on the day of the incident ie 20 February 2015 and the time when such events happened.

[47] The first accused (DW1) testified that he was arrested on the day itself around 11.30–11.35am but his son DW4 testified that he saw his father DW1 was doing the car wash of his Toyota Hilux outside their house at around 12.30 midday. Meanwhile, DW8 testified that her husband DW1 did not go

anywhere on the day in question but both DW1 and DW4 told the court that they went out from the house to feed the pigs at the pigsty at about 6am and returned at around 7am the same day.

[48] The prosecution further submitted that the defence witnesses were deliberately telling lies in court regarding DW1 and DW4 repaired the motorcycle on the 18 February 2015 in their attempt to show the connection of the GSR particles found on DW1's trousers with the brake linings of a car, motorcycle or bicycle instead of from a shotgun.

[49] DW1 also claimed that he bought the firecrackers on the 19 February 2015 and played it on the same night of 19 February 2015 in his further attempt to justify the findings of the GSR on his trousers by the chemist PW12 that it could have been from the firecrackers.

[50] DW6, however, testified that the firecrackers were already bought by DW1 when DW1 told DW6 at the restaurant during the lunch time and not bought by DW1 on his way back to Batu Niah from the restaurant as alleged.

[51] In regard to the second accused (DW2), his evidence was supported by his ex-wife DW3 that he was in his house when DW8 called him at around 2–3pm informing him that the first accused and DW4 were arrested by the police.

[52] In any event, it was the prosecution submission that the excellent identification of both accused by PW6 had destroyed the defence of alibi advanced by both the accused persons *(Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49; [2013] 9 CLJ 692).

[53] In rebuttal, the defence submitted although there were minor contradictions in the evidence of the alibi witnesses, it did not contradict each other on material particulars. The core issue of where both the first and second accused were at the time of the alleged offence has always been maintained. The most important thing is that all the alibi witnesses saw both the first and second accused at home on the day of the incident.

[54] The defence further submitted that the facts that both the first and second accused were under detention after their arrest and they had not seen their family members during the said detention couple with the facts that the caution statements of the other alibi witnesses were recorded during that period of detention, there was no possibility of collusion or concoction. As such a higher evidential weight much be attached to the caution statements of the alibi witnesses to establish that both the first and second accused persons were not at the crime scene.

[55] The prosecution also submitted that both accused had the motive of killing the deceased and PW6 when they referred both the deceased and PW6 as thieves for stealing the oil palm fruits in the area or around Rumah Lagan.

[56] In rebuttal, the defence argued that both PW6 and the deceased were not employed by or working for Ladang Seatex and yet they were found harvesting oil palm fruits from Ladang Seatex when the incident happened. The defence submitted that this fact would establish a motive for whoever from Ladang Seatex or others who lay claim to the area and not the first and second accused to have killed the deceased as PW6 and the deceased had been stealing oil palm fruits from Ladang Seatex.

DEFENCE ON THE IDENTITY OF THE FIRST AND SECOND ACCUSED AT THE CRIME SCENE

[57] It was also the defence case that the PW6 had never seen anybody at the crime scene and had concocted evidence to show that it was the first and second accused that were involved in the shooting of the deceased.

[58] The evidence of PW6 on the sequence of the gunshot is contradicted with the statements recorded in the remand papers (exh D2) dated 21 February 2015 filed in the magistrates' court by ASP Julius Panai ('PW21').

[59] At p 2 of exh D2, it is stated that 'Terdapat Juga Saksi Yang Melihat Dua Orang Suspek Melepaskan Tiga Das Tembakan Kearah Si Mati'. These words are in bold and underlined.

[60] PW21 claimed that there was a mistake in the above fact and information. The defence submitted that if there was any truth to the claim, such words would have been amended but not, as the same fact and information are still appearing in the second remand papers (exh D3).

[61] This information about the shooting incident, according to PW21, came from PW6. Hence, it was the defence submission that if this information is correct, it would mean that the alleged two suspect shot the deceased three times at the same time whereas from PW6's own evidence in court, he heard three gunshots at three different times and only the third gunshot was directed at the deceased.

[62] The defence also submitted that PW6's evidence that one of the accused persons pointed the shotgun at him cannot be true because it would only take a split second for the shooter to shoot at PW6 as he had the shotgun already pointed at PW6. This would have been the likely situation because PW6 had

one to two minutes from the time he saw both accused pointing the shotgun towards the deceased to the time before he ran away to save his life.

[63] The defence further submitted that the evidence of PW6 is not credible for inconsistency whereby in cross-examination he stated that he only saw both accused for about one to two seconds at the crime scene and not for one to two minutes as he stated earlier.

[64] This time frame of one to two seconds of having seen the three people who stood next to each other and one of whom who allegedly shot the deceased was informed by PW6 to PW21 not long after the shooting incident whereas in court, PW6 expanded the time to one to two minutes.

[65] The defence, hence, submitted that the contradiction of between one to two minutes and one to two seconds, demonstrates the length PW6 is willing to go to, just to implicate both the accused persons in causing the death of the deceased. In short, PW6 was trying to make a fleeting glimpse as described by the *Turnbull* Guidelines into a long observation.

[66] The credibility of PW6 was further question when Cpl Rulan ak Jayah ('PW5') testified that PW6 had informed him that Tuai Rumah Lagan, Columbus and another person whose name PW6 was not sure off, were the suspects in the shooting case. PW5 further stated that the arrest of Justin Roy, the third suspect was based on the information obtained from the villagers including PW6. It was obvious that PW6 must have known Justine Roy otherwise the police would not be able to arrest him.

[67] It was, therefore, the defence submission that the information given by PW6 to a police officer PW5 was in contradiction with PW6's evidence in Court that he could not identify the third person at the shooting incident as the third person was facing backward towards him.

THE ID PARADES

[68] The defence also submitted that the ID parades were unreliable as they were not conducted according to the established principle of laws.

[69] It was submitted by the defence that PW6 never saw both accused at the crime scene but only saw them at the lock-up of Central Police Station ('CPS'), Miri. This is based on PW6's evidence that he was detained in the lock-up of CPS Miri for about 12–14 days and inside the same lock-up, then only he knew that the first and second accused were also detained two cells away from his cell.

[70] Before the ID parades were conducted on 22 February 2015, PW6 had at least two days to observe the first and second accused in the lock-up and by PW6's own evidence, he had passed by the cell where the first and second accused were detained and he had seen them when he was taken out of the lock-up.

[71] The defence submitted that the manner as to how the above ID parades were conducted had caused prejudice to the first and second accused as PW6 was put in the same place of detention with the first and second accused before the ID parades were carried out and based on the evidence of the ID parade officer ie Insp Mizlan ('PW20'), the participants involved in the three ID parades were the same excluding the first accused, second accused and the first accused's son Justin Roy.

[72] PW20 who was the ID Parade officer told the court that in the three ID parades conducted, PW6 can identify both the first and second accused in the first ID parade and second ID parade respectively but PW6 could not identify Justine Roy in the third ID parade.

[73] It was the defence submission that PW6 could not have seen the first and second accused before their arrest because his evidence regarding the three ID parades is not consistent and not in the sequence order as demonstrated by PW20. In his evidence, PW6 stated during the first ID parade, nobody was identified and the first and the second accused were only identified during the second ID parade and the third ID parade respectively.

IDENTIFICATION OF THE FIRST AND SECOND ACCUSED DURING THE TRIAL IN COURT

[74] Following from the breach of the ID parade established procedures, the subsequent identification of both accused during the trial in court must also suffer the same fate of being unreliable.

[75] It must be noted that PW6 is a protected witness in the present case and whilst giving his evidence in court through the video link, his appearance could not be seen and only his voice could be heard by both accused whereas PW6 could see both accused through the monitor of the video link.

[76] The defence submitted that PW6 could have identified the first and second accused during the trial in court probably because they were the only persons sitting there through the monitor of the video link and further PW6 had earlier on seen them in the CPS lock-up, Miri before the ID parades.

WHETHER PW6 HAD SEEN THE FIRST AND SECOND ACCUSED BEFORE THE SHOOTING INCIDENT

[77] In relation to the previous occasions that PW6 had seen the first and second accused prior to the alleged shooting incident, it was the defence submission that PW6's evidence in this respect should be disregarded for the reason that PW6 had not been consistent in regard to the date and time when he allegedly saw them.

[78] For instance, PW6 said he had seen the second accused two weeks after he had started work. At the same time, he claimed to have started working a month before the alleged shooting incident sometime in January 2015. He changed his version by stating that he had started working in Ladang Seatex in December 2014.

[79] Likewise, for the first accused, PW6 could not give any precise date and time that he had previously seen the first accused which make it impossible for the first accused as well as the second accused in their attempt to challenge PW6's version on the alleged occasions that PW6 had seen them.

THE COURT'S FINDINGS

[80] At the conclusion of the case, having carefully re-evaluate and scrutinised the evidence given by chemist PW12 in its entirety, I found that his evidence remains unsatisfactory to the extent that this court is facing with some difficulties to conclude with any degree of certainty whether the result of the analysis of the sample using the scanning electron microscope showing photographs (exhs D1(2), (3) and (4)) were that of the GSR particles.

[81] It is of the utmost important that when testifying in court as well as writing report, a chemist must be meticulous and precise in the use of words, particularly in a case that attracts the mandatory death penalty (*Public Prosecutor v Ang Soon Huat* [1991] 1 MLJ 1; *Public Prosecutor v Sulaiman bin Mohamad Noor* [1996] 1 MLJ 196).

[82] In drug trafficking case, the evidence of the chemist as an expert witness must be satisfactorily and adequately adduced to prove that the impugned drug is a 'dangerous drug' as defined under the Dangerous Drugs Act 1952. The same principle must be equally applied to the chemist in the present case although the subject matter of the analysis is somewhat different which concerns the metal stubs of a gunshot.

[83] There was also a doubt as to who actually analyse the metal stubs sample sent by PW14 to PW12 given the fact that there was another staff ie Aida whose

A name was written at the bottom left corner of exhs D1(2), (3) and (4) as the person who had analysed the sample as opposed to PW12's evidence that the sample was analysed by him and subsequently prepared the chemist report exh P24.

B **[84]** Since PW12 claimed that he never took any photographs of the sample and yet there were photographs that were taken from the scanning electron microscope as shown in exhs D1(2), (3) and (4), it is highly probable that the analysis of the sample could have been done by Aida as indicated by the words 'Sample Analysis By AIDA' at the left bottom corner of the said exhs D1(2), (3) C and (4).

[85] Later during the cross-examination of PW12 when he was recalled, he suddenly made a U-turn by admitting that it was Aida who did the analysis of the data as contained in exhs D1(1)–(14) and he merely interpreted the data D and subsequently prepared his chemist report exh P24.

[86] In interpreting the data obtained by Aida in particular exhs D1(5)–(14), PW12 only found one GSR particle in E6A which comprises of other combinations apart from lead, barium and antimony. He said on the E sample E6A, GSR particle was detected under the fifth column with the abbreviation 'SbBaPb' but unfortunately PW12 did not go further to explain to this court as to what this abbreviation stood for.

F **[87]** Taken the evidence of PW12 on its face value that the GSR particles will look like a sphere shape through the photographs taken by using the scanning electron microscope, there is nothing of that image appeared if one is to look at the photographs in exhs D1(2), (3) and (4) which are all in a square box shape.

G

[88] Since it is obvious that Aida was involved in the analysis of the sample and printed exhs D1(2), (3) and (4), she should have been called to testify more so when the alleged photographs showing the GSR particles were not actually representing the actual shape of the GSR particles which are not necessarily H round but more or less like the shape of a sphere as testified by PW12.

[89] As the prosecution case is centred around the evidence of PW12 on the analysis of the stubbing taken from the clothing of the two accused and in the light of the material contradictions of his evidence in this respect, I have no I choice but to hold that his evidence was unworthy of credit. The contradictions were unexplained even after the recalling of PW12.

[90] I am also of the view that the evidence of PW6 on the identification of both accused cannot be relied upon due to the inconsistencies of his evidence.

Further, the standard procedures under the *Turnbull*'s guidelines had not been fully complied with by the prosecution witnesses especially the ID parade officer as PW6 had the benefit of seeing both the accused when they were detained in the same lock-up before the ID parades were conducted. Hence, PW6's memory of the faces of the first and second accused is likely to be from the lock-up rather than his memory of the first and second accused at the place of the shooting incident.

[91] PW6's evidence that he had seen both the accused at the place of the incident is unreliable because he had changed his evidence from allegedly seeing the first and second accused for about one to two minutes and later told the court that he allegedly seeing them for only about one to two seconds. The case of *Duis Akim* relied by the prosecution may not be relevant to the present case because in *Duis Akim*'s case, the witness had a good five minutes 'look' at the faces of the appellants within the enclosed area of the 7-Eleven store whereas PW6 in the present case allegedly saw both the first and second accused in an open area on an uphill slope at a distance of about 30 meters.

[92] On the finding of the burnt shotgun and cartridges, although they were discovered behind the house previously occupied by the second accused, there is no evidence to show that the second accused had an exclusive possession of the said exhibits for the reason that four months had passed after the arrest of the second accused when the exhibits were found and the surrounding areas of the house was accessible to anyone.

[93] The possibility of someone other than the second accused could have placed the shotgun at the backyard of the house to implicate the second accused with the offence cannot be ruled out because from the evidence there was a competing claim over the ownership of the said house.

[94] The new occupant of the house ie Jeffery ak Buda ('PW19') who had found the exhibits behind the house would not probably want the second accused to be released otherwise the latter may reclaim the said house from PW19.

CONCLUSION

[95] At the conclusion of the trial, it is the duty of this court to re-evaluate all the evidence adduced in the course of the hearing, inclusive of that adduced by the prosecution and to decide whether the prosecution has proved its case beyond reasonable doubt.

[96] On the other hand, the accused has the onus to produce evidence of his own or to point to something in the prosecution evidence that at the very

lowest make the trier of facts less than sure of any conclusions he might otherwise be prepared to base upon the prosecution evidence (*Chan Chwen Kong*).

[97] In the present case, on the re-evaluation of the whole case, I found that the evidence of the chemist PW12 on the alleged presence of GSR is unsatisfactory even after he was given the opportunity to give his explanation during the recall at the defence stage.

[98] I also found that the identification of both accused by PW6 is flawed in view of the rebuttal evidence of the defence particularly on the manner how the ID parades were conducted and the inconsistencies of PW6's evidence.

[99] Further, I am of the view that the discovery of the burnt shotgun and cartridges at the backyard of the house previously occupied by the second accused is also not a conclusive proof to relate both accused with the murder of the deceased in the absence of any evidence of exclusive control and possession of the said exhibits.

[100] Having considered all evidence at the conclusion of the trial, it is my findings that the prosecution has failed to prove its case beyond reasonable doubt.

[101] With all the above reasons, both the accused are therefore entitled to be discharged and acquitted. The exhibits are to be disposed off by the prosecution after the lapse of the appeal period.

Both accused discharged and acquitted.

Reported by Dzulqarnain Ab Fatar